

US EPA ARCHIVE DOCUMENT

Overview of Liability

Walter Mugdan
U.S. EPA, Region 2
(212) 637-3724



What You Should Know About CERCLA's Liability Scheme

- How CERCLA liability works
 - Who is liable?
 - Defenses, limitations, and exemptions
 - EPA's enforcement discretion policies

CERCLA Liability (§ 107)

- Release or threatened release
 - Of a hazardous substance
 - From a facility
 - Which causes response costs to be incurred
- PRPs = Potentially Responsible Parties, as defined in section 107

Liability Is Retroactive

- PRPs can be held liable for the present effects of acts which occurred prior to CERCLA's enactment (1980)

Liability Is Joint and Several

- Any one PRP can be held liable for the cost or performance of the site cleanup
- Divisibility of harm can be a factor

Liability Is Strict

- No regard to fault or culpability
- PRPs cannot defend actions based on acting in accordance with industry standards, or claiming no negligence

Liability Overview

- Four classes of PRPs
- Three statutory defenses to liability
- Several exemptions

Current Owners and Operators (§ 107 (a)(1))

- Actual ownership/operation
- Parent corporations: articulated in *U.S. v. Bestfoods*
 - Derivative liability
 - Direct liability
- Individual liability of corporate officers, directors, managers, etc: “exercised control”

Past Owners and Operators (§ 107 (a)(2))

- O/O at the time of disposal
- Interim owners: “passive migration” issue

Generators (§ 107(a)(3))

- Arranged for treatment or disposal, or transport for treatment or disposal, of hazardous substances
- Constructive possession
- Knowledge of disposal location not relevant
- “Aceto” liability

Transporters (§ 107(a)(4))

- Accepted hazardous substances for transport and selected the disposal/treatment site

Successor Liability

- General Rule: asset purchasers do not acquire the liabilities of the seller corporation
- Fact specific determination
- Appeals courts are divided on the issue of a federal rule of successor liability

Successor Liability

- 5 Exemptions:
 - Fraud
 - *De Facto* merger
 - Express or implied assumption
 - Purchaser is a mere continuation of the seller
 - Substantial continuity or continuity of enterprise; DOJ's brief in the *Exide* case

Extent of Liability

- All costs of removal or remedial actions taken by the U.S., State or Indian Tribe, that are not inconsistent with the NCP
 - Scope of costs included
 - “Not inconsistent with NCP” standard

Extent of Liability

- Damages to natural resources in an action brought by a Federal, State or Tribal natural resources trustee
 - Early involvement of trustees
 - SOL issues
- Costs of health assessments under §104(i)

Defenses to Liability (§ 107(b)(3))

- Three defenses
 - Acts of God
 - Acts of war
 - Acts/omissions of a third party (“third party defense”)

Third Party Defense

- No contractual or other relationship with the third party
- Exercised due care with respect to the hazardous substances
- Took precautions against foreseeable acts or omissions of the third party

Third Party Defense: Innocent Landowners (§ 101(35))

- Three types
 - At the time the party acquired the property, the party did not know and had no reason to know of hazardous substances
 - Government acquired facility through “involuntary” acquisitions
 - Party acquired the facility by inheritance or bequest

Third Party Defense: Innocent Landowners (Cont.)

- Elements of defense
 - No contractual relationship
 - Due care
 - Precautions against foreseeable acts or omissions
 - Cooperation, assistance, access; compliance with land use restrictions and institutional controls

Third Party Defense: Innocent Landowners (Cont.)

- Elements of defense
 - Purchasers did not know or had no reason to know of contamination after “all appropriate inquiry”
 - Purchasers must take “reasonable steps” during ownership with respect to hazardous substance contamination on the property
 - Governments and inheritors may have different obligations

All Appropriate Inquiry

- For purchases before May 31, 1997, apply 5 statutory factors:
 - Specialized knowledge or experience
 - Relationship of purchase price to property value
 - Commonly known or reasonably ascertainable information
 - Obviousness of contamination
 - Ability of defendant to detect the contamination by appropriate inspection
- For purchases between May 31, 1997 and date of new regs, apply ASTM Phase 1 requirements

AAI Proposed Rule

- “Standards and Practices for All Appropriate Inquiries,” 8-26-04
- Requirements for investigation/inquiry
 - History of property use, obvious or likely contamination
 - Enforcement history, environmental liens, ICs, engineering controls
 - Purchase price/fair market value

AAI Proposed Rule

- Requirements (cont.)
 - Commonly known, reasonable ascertainable information
 - Interviews and visual inspections
 - Description of data gaps
 - Environmental professional's opinion and signature

All Appropriate Inquiry for Residential Property

- Facility inspection
- Title search
- Results reveal no basis for further inspection

Reasonable Steps

- Stop any continuing release
- Prevent any threatened future release
- Prevent or limit any human, environmental or natural resource exposure

Prospective Purchaser Agreements

- Negotiated agreement used at EPA's discretion
- May 31, 2002, Guidance: statutory liability protection makes PPAs unnecessary in most cases, but will consider where necessary for transaction and:
 - Significant windfall lien
 - Substantial public benefits from transaction (e.g., significant cleanup, reduced threat of litigation)
- Covenant not to sue purchaser

Bona Fide Prospective Purchasers Exemption (§ 107(r))

- Elements
 - Acquired ownership after 1/11/02
 - Owner not a PRP or affiliated with a PRP
 - Disposal occurred before purchase
 - Conduct “all appropriate inquiry” (can have knowledge of contamination and still have liability protection)

BFPP Exemption (Cont.)

- Elements (cont.)
 - Take “reasonable steps”
 - Provide cooperation, assistance, access; comply with land use restrictions, institutional controls, info requests and administrative subpoenas; provide legally required notices

BFPP Exemption (Cont.)

- Windfall lien on BFPP property
 - For unrecovered response costs
 - Limited to the lesser of the increase in FMV attributable to EPA's response action or the unrecovered response costs
 - Section 107(l)(3) notice/validity requirements apply to windfall lien
 - Authorizes EPA section 107(r) windfall lien settlements
 - No statute of limitations on section 107(r) windfall lien

Contiguous Property Owners (§ 107(q))

- Elements
 - Property that is or “may be” contaminated
 - Only contamination is from property that is contiguous to or “similarly situated with respect to”
 - Owner not a PRP or affiliated with a PRP
 - Did not cause, contribute to or consent to a release

Contiguous Property Owners (Cont.)

- Elements (cont.)
 - Conduct all appropriate inquiry: did not know or have reason to know property was or could be contaminated by release from other real property
 - Provide cooperation, assistance, access; comply with land use restrictions, institutional controls, info requests and administrative subpoenas; provide legally required notices

Contiguous Property Owners (Cont.)

- To maintain the liability protection, owner must take “reasonable steps” to:
 - Stop continuing releases
 - Prevent threatened future releases
 - Prevent or limit human, environmental, or natural resources exposure to hazardous substance release

Contiguous Property Owners (Cont.)

- For migration of contaminated groundwater, no remediation necessary
- EPA may provide comfort letter addressing reasonable steps at specific site, if there is significant federal involvement at site

Contiguous Property Owners (Cont.)

- EPA may issue:
 - No action assurance letter
 - Contribution protection
- Party purchasing with knowledge after conducting all appropriate inquiry does not qualify as contiguous property owner, but may still qualify for BFPP liability protections

De Micromis Exemption (§ 107(o))

- NPL sites
- Generator/Transporter
 - <110 gal. liquid
 - < 200 lbs. solid
- Disposed, treated, transported all or part prior to April 1, 2001

De Micromis Exemption (Cont.)

- Exceptions
 - Material contributed significantly to the cost of response
 - Failure to comply with CERCLA information request or administrative subpoena
 - Impedes or has impeded the performance of a response action
 - Criminal conviction for conduct for which the exemption would apply
- Burden shifting and attorney's fees for contribution actions v. de micromis parties

Municipal Solid Waste Exemption (§ 107(p))

- NPL Sites
- Applies to MSW generated by:
 - Residential owner/operator/lessee
 - Small business <100 FTE or equivalent
 - Non-profit organizations <100 paid FTE at the location

MSW Exemption (Cont.)

- What is MSW?
 - Household waste
 - Commercial, industrial or institutional waste:
 - › Essentially the same as household waste
 - › Collected and disposed of with other MSW as part of normal municipal collection service
 - › Hazardous substances are no greater in quantity than found in typical household waste

MSW Exemption (Cont.)

- Exceptions
 - MSW contributed significantly to the cost of response
 - Failure to comply with CERCLA information request or administrative subpoena
 - Impedes or has impeded the performance of a response action

MSW Exemption (Cont.)

- Burden of Proof
 - Private cost recovery action, burden always on plaintiff
 - Government cost recovery:
 - MSW disposed before 4/1/01, burden is on government
 - MSW disposed after 4/1/01, burden is on defendant
- Attorney's fees available against non-government party bringing unsuccessful contribution action

Recycling Exemption (§ 127)

- Exempts certain generators and transporters that “arranged for recycling of recyclable materials”
- Lists covered materials: paper, plastics, glass, textiles, rubber, metal, spent batteries
- Establishes criteria for exemption (not a sham transaction)
- Identifies actions on the part of an arranger that nullify exemption

Service Station Dealers (§ 114(c))

- Dealers that manage recycled oil exempt if recycled oil was:
 - Not mixed with any other hazardous substance
 - Managed in compliance with appropriate regulations or standards
- Applicable to generator and transporter liability, but not owner/operator liability

Secured Creditors Exemption (§ 101(20))

- Legal claim of ownership to protect security interest only
- Cannot “participate in management”

Exemption for State and Local Governments (§ 107(d))

- Exempt from:
 - Costs/damages resulting from emergency response
 - Except for gross negligence or intentional misconduct
 - Costs from rendering care in accordance with NCP
 - Except for negligence
 - Liability if property acquired involuntarily

Exemption for Fiduciaries & Trustees (§ 107(n))

- Acts for the benefit of another party as, for example, an executor
 - Specific actions permitted without triggering personal liability
 - Fiduciary liability shall not exceed assets held in fiduciary capacity
 - Negligence pulls fiduciary into liability scheme

Other Liability Exemptions

- Contractors/ government employees in context of response action (§ 119)
 - Except for negligence, gross negligence, or intentional misconduct
- Petroleum, crude oil or natural gas (§ 101(14))
- Pesticide application (§ 107(i))
- Federally permitted releases (§ 107(j))

Enforcement Discretion

- Described in EPA policy and guidance documents
 - Non-binding
 - Case-by-case determination
- Policies may apply where new SBLRBRA exemptions do not
 - Non-exempt de micromis parties at non-NPL sites
 - MSW/MSS policies
 - Discussed further in Enforcement Options module

Enforcement Discretion: Residential Homeowner Policy

- Single-family residence
- Located on a Superfund site
- Did not cause or contribute
- Must provide access and information

Enforcement Discretion: Contaminated Aquifer Policy

- Off-site source
- Did not cause or contribute
- No contractual relationship to PRPs, an agent or employee
- Not otherwise liable
- Cooperation of landowner